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November 4, 1998

VIA MESSENGER

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20054

Re: CC Docket No. 96-128
Notice of Ex Parte Communication

Dear Ms. Salas:

On Tuesday, November 3, representatives of the International Telecard Association ("ITA") met with Paul Gallant, Legal Advisor to Commissioner Tristani, to discuss the above-mentioned proceeding. ITA requested that the Commission take final action on its Application for Review, filed April 8, 1998, regarding the Bureau's Memorandum Opinion and Order issued on delegated authority in this docket. In addition, ITA explained its position on payphone compensation issues that the Bureau is currently considering on remand, as reflected in its comments of record.

ITA was represented by Howard Segermark, Executive Director of ITA, Glenn Manishin, and the undersigned counsel, Stephanie Joyce. One copy of the attached document was distributed.

Pursuant to Section 1.1206 of the Commission's Rules, an original and one copy of this letter and its attachment are being filed for inclusion in the record. Please contact me should you have any questions in regard to this matter.

Sincerely,

Stephanie A. Joyce

Receipt

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERNATIONAL TELECARD ASSOCIATION and WorldCom, Inc.,	)	
Petitioners,	)	
v.	)	Case No. 98-1291
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,	)	
Respondents.	)	

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING *EN BANC*

Pursuant to Fed. R. App. P. 40 and Circuit Rule 35, Petitioners International Telecard Association ("ITA") and WorldCom, Inc. ("WorldCom") respectfully request rehearing of the Court's *per curiam* September 15, 1998 decision dismissing their Petition for Review of an order of the Federal Communications Commission ("FCC" or "Commission"). ITA and WorldCom also suggest the appropriateness of rehearing *en banc* in order to allow the full Court the opportunity to address the question of first impression presented in this case regarding appellate jurisdiction under Section 5 of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(7)("the Act"). If the panel's decision is permitted to stand without correction or elaboration, this Court will have established a new and substantial administrative exhaustion requirement, applicable to a wide variety of FCC proceedings, with no discussion of the substantive legal or policy merits.

BACKGROUND

On April 8, 1998, ITA filed an Application for Review with the FCC of the agency's March 9, 1998 Memorandum Opinion and Order[1] regarding payphone compensation rates ("Bureau Order"). ITA requested that the FCC reverse the Bureau Order on grounds that it arbitrarily waived conditions of the agency's payphone compensation rules that were central to the Court's rationale in its prior appellate decisions[2] and that discriminate against prepaid phone card providers. Receiving no response from the Commission, Petitioners filed a Petition for Review with this Court on June 26, 1998, asserting jurisdiction under Section 402 of the Act, 47 U.S.C. § 402(a), and 28 U.S.C. §§ 2342 and 2344.

The FCC moved to dismiss the petition on July 16, 1998, relying upon this Court's decision in *Richman Bros. v. FCC*[3] that failure to request Commission review of an order issued on so-called "delegated authority" bars appellate review under Section 5 of the Act, 47 U.S.C. § 155(c)(7). The Commission argued that this Court lacked jurisdiction because "[h]aving failed to ask the full Commission to review the matter, petitioners cannot meet that [subject matter jurisdiction] burden in this case[.]"[4] Petitioner ITA had in fact filed an Application for Review,[5] which the FCC later ackowledged on reply.[6] On September 15, 1998, a panel of this Court granted the FCC's motion and dismissed the case without opinion. Petitioners now seek rehearing of this decision by the full Court to reconsider the limits of federal jurisdiction over Commission orders under the Act.

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[1] *Implementation of the Pay Telephone Reclassifications and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, CC Docket No. 96-128,, 13 FCC Rcd. 4998 (1998).

[2] *See MCI v. FCC*, 143 F.3d 606 (D.C. Cir. 1998); *Illinois Pub. Telecom. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997).

[3] *Richman Bros. Records, Inc. v. FCC*, 124 F.3d 1302 (D.C. Cir. 1997).

[4] FCC Motion to Dismiss at 2 (July 16, 1998).

[5] Petitioners' Opposition to Motion to Dismiss, at 2 (July 24, 1998).

[6] FCC Reply in Support of Motion to Dismiss at 1 (July 28, 1998).

ARGUMENT

This case presents a question of first impression regarding appellate jurisdiction to review FCC orders that the agency chooses to issue on "delegated authority," but for which the Commission refuses to decide an application for full agency review. Contrary to the assumption of the panel's *per curiam* order, this case is not controlled by *Richman Bros.*, nor does any other precedent support dismissal, because the administrative "filing" required by Section 5 was in fact made by ITA below. The plain language of Section 5 of the Act, as well as the settled policy of administrative exhaustion, is also inconsistent with the panel's decision. Accordingly, the decision fully warrants rehearing, and rehearing *en banc*, in order to decide this novel jurisdictional issue with a full Court opinion and analysis.

Section 5(c)(7) of the Act states that "the filing of an application for review . . . shall be a condition precedent to judicial review of any order decision, report or action made or taken pursuant to a delegation [of authority]." 47 U.S.C. § 155(c)(7). In compliance with this language, ITA first sought full agency review of the Bureau Order.[7] Filing this Application for Review fully comports with the plain meaning and the policy of the administrative exhaustion requirement of the Act.

Section 5 provides that the *filing* of an internal agency appeal is a condition precedent to federal appellate review of a "delegated authority" decision. Applying this express language, this Court in *Richman Bros.* held that the failure to exhaust administrative remedies by filing an application for review is jurisdictional and cannot be excused, even for matters (such as primary jurisdiction referrals) that do not originate with the agency. 124 F.3d at 1304. But neither *Richman* nor any other decision applies Section 5 to circumstances where an application for

[7] A copy of this Application for Review, filed April 8, 1998, was attached to Petitioners' opposition to the FCC's motion to dismiss.

review has been filed but not yet decided by the agency. (Neither the FCC nor the panel cites any such cases.) Thus, as Petitioners argued on brief,

> Neither this Court nor the Supreme Court has ever held that Commission consideration of an 'application for review' must be concluded prior to seeking judicial review. Such a construction would not only contravene the plain language of Section 5(c), but also settled law on exhaustion of administrative remedies.[8]

The express language of Section 5 is dispositive. Congress is presumed to mean what it says when drafting a statute. *Moskal v. United States*, 498 U.S. 103, 108 (1990)("' In determining the scope of a statute, we look first to its language,' giving the 'words used' their 'ordinary meaning.'")(citation omitted); *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 373 (1986)("The 'plain purpose' of legislation, however, is determined in the first instance with reference to the plain language of the statute itself."); *Griffin v. Oceanic Contractors*, 458 U.S. 564, 570 (1982)("Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'")(citation omitted).

Settled law on exhaustion of administrative remedies requires courts to heed the strictures Congress has mandated. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992)("Where Congress specifically mandates, exhaustion is required."). Congress drafted Section 5 to require specifically the *filing* of an application for review prior to judicial review, without any requirement to wait for that application's disposition. By interpreting this provision *sub silentio* to require something more than Section 5 stipulates, this Court has interposed its own policies on proper allocation of court/agency jurisdiction for those established by Congress. Yet the appropriate role of courts — in both statutory interpretation and administrative exhaustion — is to apply congressional intent, not to unilaterally set policy.

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[8] Petitioners' Opp. at 2.

Applying the Act's plain language is, as a practical matter, entirely consistent with accepted policy underlying the exhaustion requirement. It is proper that an agency retain jurisdiction over its own matters until its expertise has been exhausted, thereby requiring aggrieved parties to defer to the agency prior to seeking relief in the judiciary. Congress "imposed the requirement in order to ensure that the full Commission had 'an opportunity to review the decision before the matter goes to the courts.'"[9] It is the filing of an application for review that gives the full FCC the "opportunity to review" delegated staff decisions. Whether or not the agency chooses to exercise that opportunity — and either prevent or moot an appeal — is entirely a matter of administrative discretion, not judicial jurisdiction.[10]

The FCC does not really contest any of this. In its initial motion to dismiss this appeal, the Commission flatly (and incorrectly) stated that the appeal was barred because the agency had not received an application for agency review. Once this faulty premise was exposed by Petitioners, the FCC argued that the appeal should nonetheless still be dismissed, without ever explaining why Congress could have intended to make judicial review hinge on resolution of an intra-agency appeal as to which there is neither a deadline nor any obligation to decide. With an alarming lack of candor, the agency acknowledged, *only by its silence and lack of controlling citations*, that its motion actually asked this Court to make new law on the limits of appellate jurisdiction.

At the very least, the issue of first impression raised in this case deserves more than *per curiam* treatment. With this decision, the Court has created new precedent on exhaustion of administrative remedies, and a published opinion is therefore necessary to provide a reasoned

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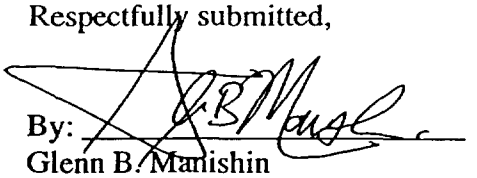
[9] FCC Reply at 1 (*quoting* S. Report No. 576, 87th Cong., 1st Sess. at 2).

[10] Applications for full Commission review routinely languish at the agency for years without decision. For instance, instead of deciding an application for agency review of staff's former payphone rules, the FCC waited two years until its new payphone rules were promulgated and then released an order dismissing the application on grounds of mootness. *Application for Review and Motion for Stay of Allnet Communications Services, Inc.*, Memorandum Opinion and Order, FCC 98-161 (rel. July 16, 1998).

explanation, uniformity among the courts and to guide administrative practice at the FCC. Whether or not the full Court agrees with the panel decision, this case should be reheard in order to provide the courts and practitioners with a full analysis of Section 5 jurisprudence in these new circumstances.

Respectfully submitted,



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Dated: October 29, 1998

ADDENDUM

United States Court of Appeal for the D.C. Circuit

Order dismissing Case 98-1291

September 15, 1998

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-1291 **September Term, 1998**

The International Telecard Association and WorldCom Inc.,
Petitioners

v.

Federal Communications Commission and United States of America,
Respondents

Telecommunications Resellers Association, et al.,
Intervenors

BEFORE: Ginsburg, Sentelle, and Rogers, Circuit Judges

ORDER

Upon consideration of the motion to dismiss, the opposition thereto and the reply; and petitioners' alternative request for a writ of mandamus, it is

ORDERED that the motion to dismiss be granted, and the request for a writ of mandamus be denied. Because petitioners have not exhausted the administrative remedies available within the Federal Communications Commission, judicial review is not available. See 47 U.S.C. § 155(c)(7); Richman Brothers Records v. F.C.C., 124 F.3d 1302, 1303 (D.C. Cir. 1997). Petitioners' alternative mandamus request must be denied because the agency's delay in acting on the application for administrative review filed in April 1998 is not unreasonable. See Telecommunications Research & Action Center v. F.C.C., 750 F.2d 70, 79 (D.C. Cir. 1984).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

Per Curiam

CERTIFICATE OF SERVICE

I, Stanley Bryant, do hereby certify that on this 29th day of October, 1998, that I have served a copy of the foregoing document via U.S. Mail, postage pre-paid, to the following:

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